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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JAVIER SAENZ,
Petitioner,
v.
RICHARD ARRELLANO GONZALEZ,
Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In the context of a lawful arrest, whether a jury finding that the arrestee physically resisted his arrest bars a §1983 excessive force claim against the arresting offer where the evidence shows the officer responded in kind with only that amount of force necessary to effect the arrest?

LIST OF PARTIES

1. Javier Saenz, Petitioner
2. Richard Arrellano Gonzalez, Respondent

Other Parties to the Court of Appeals Decision:

3. Maria Gonzalez
4. City of Brownsville, Texas
5. Andres Vega
6. Daniel Bennett

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REFERENCE TO OPINIONS

1. The August 14, 1995, decision of the Court of Appeals for the Fifth Circuit, affirming the trial court judgment, is unreported and appears at Appendix A.

2. The Memorandum of the United States District Court for the Southern District of Texas, entered April 20, 1994, appears at Appendix B.

3. The verdict of the jury appears at Appendix C.

4. The judgment of the trial court appears at Appendix D.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered August 14, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (West 1993).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This excessive force case is based upon the alleged denial of Respondent's constitutional rights during Respondent's arrest by Petitioner. The case is thus grounded upon 42 U.S.C. § 1983 (West 1994):

> **§ 1983. Civil action for deprivation of rights**
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

A claim that excessive force was used during an arrest is analyzed under the Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

STATEMENT OF THE CASE

A. JURISDICTION OF THE DISTRICT COURT.

The United States District Court for the Southern District of Texas exercised jurisdiction over this case under 28 U.S.C. §§ 1331 and 1343 (West 1993).

B. FACTUAL HISTORY.

This case accentuates how remarkably difficult it is to be a police officer and to defend one's actions in the face of the growing public distrust of local officers. Richard Gonzalez, Respondent, is a former professional boxer and carpet layer in Brownsville, Texas. On June 18, 1986, he asked his son to take his truck to a local gas station for gas. While at the station, the son caused the truck to damage one of the gasoline hoses. The station owner, Mr. Martinez, demanded the truck remain at his station until the following morning so that an adjustor could assess the damages. Gonzalez was under the impression that he could retrieve the truck the next morning. At about 7:30 a.m., the following morning, Gonzalez rode his son's bicycle to Martinez's station to retrieve his truck. However, Martinez refused to release it because the adjustor had not yet arrived. In an

attempt to obtain his truck, Gonzalez showed Martinez his automobile insurance papers, certificate of title, and a business check. Martinez, nonetheless, refused to return the truck. An argument ensued and Martinez called the police.

Officer Saenz, Petitioner, arrived shortly thereafter and spoke with Martinez. Officer Saenz then approached Gonzalez, who was sitting on his bike, and informed him Martinez did not want him on the premises. Gonzalez repeatedly refused to leave without his truck. Gonzalez and Saenz began arguing with each other.

At that point, Officer Bennett arrived. Bennett was also involved in the arrest but was exonerated by the jury and is not a party to this Petition. Officer Saenz asked Bennett whether he should arrest Gonzalez. When Officer Bennett responded affirmatively, Officer Saenz announced to Gonzalez that he was being placed under arrest.[1] According to Gonzalez, Officer Saenz grabbed his right hand hard, placed it in a cuffing position, and the bicycle slipped and fell on top of Gonzalez. Saenz, who was holding Gonzalez's arm, was pulled with Gonzalez to the ground. While on the ground, Officer Bennett tried to grab Gonzalez's left hand but, according to Gonzalez's testimony, it was pinned behind him. Gonzalez said Officer Saenz hit him with his knee while yelling at him to remove his left hand. Gonzalez resisted arrest by preventing the officers from cuffing him, and the jury so found. Gonzalez further testified that, at that point, Officer Bennett kicked him in the back. Gonzalez claimed to have a small scar on his back from the kick.

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[1] The trial court found Saenz's arrest of Gonzalez for criminal trespass to be lawful and is not challenged by Gonzalez. Thus, the validity of the arrest is not in issue.

After a few minutes, Gonzalez was cuffed and placed in the back seat of Officer Saenz's patrol car. En route to the station, Gonzalez challenged Saenz to take off his cuffs and fight him. After hearing this, Officer Saenz stopped the car, turned and looked at Gonzalez, then resumed driving to the police station.

Jorge Kowalsky testified he witnessed the arrest from across the street. He described the arrest as follows:

> And I saw the man, this man here [Gonzalez], he was on a bicycle but he was on the floor, with the policeman just trying to handcuff him. And that's it.

After his release from jail, Gonzalez went to Dr. Aquilar-Vela in Matamoros, Mexico complaining of pain in his hands. Dr. Vela determined Gonzalez's right hand was fractured in two places and that his left thumb sustained ligament damage. Dr. Vela believed that Gonzalez's right hand had to have been injured by a "very strong blow." He denied that the fractures could have been caused by falling off of a bicycle unless something fell on top of it.

C. PROCEDURAL HISTORY.

Richard Gonzalez and his wife, Maria, sued the City of Brownsville, its Chief of Police, Andres Vega, and officers Daniel Bennett and Javier Saenz, both individually and in their official capacities, alleging violations of the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, false arrest, malicious prosecution and excessive force. By order dated February 4, 1994, all Gonzalez's claims, except the excessive force claim, were dismissed by summary judgment. On the same day, the trial

court denied the Defendants' Motion for Summary Judgment as to excessive force.

On February 4, 1994, the excessive force claim went to trial before U.S. Circuit Judge Reynaldo G. Garza, sitting by assignment. At the close of Plaintiffs' case, counsel for Defendants moved for judgment as a matter of law as to excessive force and qualified immunity. At the close of all evidence, defense counsel re-urged the motion for judgment as a matter of law. Both were denied.

The case went to a jury which returned a verdict (1) exonerating Officer Bennett in full, (2) finding that Gonzalez had resisted his arrest, (3) finding that Officer Saenz used excessive force in arresting Gonzalez, and (4) finding that Saenz could not have reasonably believed his actions were in accordance with clearly established law in existence at the time of the arrest. The jury awarded Gonzalez $150,000 in compensatory damages and $10,000 exemplary damages. Saenz, who was serving in the United States Navy, and stationed in Rota, Spain, was incapable of appearing at trial.

On March 22, 1994, Saenz re-urged his Motion for Judgment as a Matter of Law citing the legal insufficiency of evidence as to the jury's findings against Saenz on excessive force, qualified immunity, and damages. In the alternative, Saenz moved for new trial or remittitur.

On April 19, 1994, Judge Garza denied Saenz's Motion for Judgment as a Matter of Law, but remitted the jury's verdict to a total of $75,000 ($65,000 compensatory and $10,000 exemplary) and conditionally granted Saenz'

Motion for New Trial should Gonzalez not accept the remittitur.[2] The Court entered Judgment accordingly on April 19, 1994.

REASONS FOR ALLOWANCE OF THE WRIT

CERTIORARI SHOULD BE GRANTED TO ADDRESS WHETHER A POLICE OFFICER'S USE OF FORCE IN EFFECTING A LAWFUL ARREST IS REASONABLE AS A MATTER OF LAW AND BARS A § 1983 EXCESSIVE FORCE CLAIM WHERE THE PLAINTIFF PHYSICALLY RESISTS ARREST AND THE OFFICER RESPONDS IN KIND.

A. SUMMARY.

Gonzalez's § 1983 claim is barred under these circumstances because Officer Saenz responded only in kind with physical force and there is no evidence of gratuitous violence on his part, and Gonzalez mutually assented to the confrontation. Moreover, Officer Saenz's force, which was used only to subdue and control Gonzalez, cannot constitute an amount of force greater than that required to effect the arrest. Alternatively, assuming Saenz used more force than necessary to effect the arrest, his conduct did not rise to the level of a constitutional deprivation and could only have been *de minimus*.

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[2] Gonzalez accepted the remitted judgment on April 28, 1994.

B. THIS CASE PRESENTS IMPORTANT ISSUES OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

1. *Background.*

A claim that a law enforcement official has used excessive force in effecting an arrest is analyzed under the Fourth Amendment's "objective reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 388. 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). This Court has repeatedly recognized that 42 U.S.C. § 1983 is not a source of substantive rights but rather provides "a method for vindicating federal rights elsewhere conferred." *Albright v. Oliver*, ___ U.S. ___, 114 S. Ct. 807, 811, 127 L. Ed. 2d 114 (1994); *Graham*, 109 S. Ct. at 1870; *Baker v. McCollan*, 443 U.S. 137, 144, n. 3, 99 S. Ct. 2689, 2694, n. 3, 61 L. Ed. 2d 433 (1979).

The fundamental objective in determining whether a particular amount of force used to effect a seizure is reasonable under the Fourth Amendment is to balance the nature and quality of the intrusion on the individual's Fourth Amendment interest against the countervailing governmental interests at stake. *Graham*, 109 S. Ct. at 1871 (quoting *United States v. Place*, 462 U.S. 696, 703, 103 S. Ct. 2637, 2642, 77 L. Ed. 2d 110 (1983)). That a police officer's right to make an arrest in the first instance necessarily carries with it the right to use "some degree of physical coercion or threat thereof to effect it," is also well established. *Id.* at 1872. *See Terry v. Ohio*, 392 U.S. 1, 22-27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Such conduct must be judged without the benefit of 20/20 hindsight and in light of the split-second judgments regarding the amount of force necessary to effect a particular arrest which police officers

must make on a daily basis. *See Graham*, 109 S. Ct. at 1872.

However, *de minimus* uses of physical force do not invoke constitutional protection, provided that the use of force is not of a sort repugnant to the conscience of mankind. *See Hudson v. McMillian*, ____ U.S. ____, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992) (Eighth Amendment). It follows, therefore, that injuries sustained by such a § 1983 plaintiff which result from his or her resistance to, or struggle with, the police officer do not invoke constitutional interests. Stated in the terms of this case: assuming as true the entirety of Gonzalez's testimony regarding the force used by Officer Saenz, Gonzalez's injuries resulted directly and only from his resistance to being handcuffed.

2. *Gonzalez's physical resistance to his arrest bars his § 1983 claim where Officer Saenz responded in kind.*

In the instant case, the jury expressly found that Gonzalez resisted his arrest,[3] and that finding is unchallenged. When an officer responds only *in kind* to a

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[3] Texas defines the offense of "resisting arrest, search, or transportation" as:

> A person commits an offense if he intentionally prevents or obstructs a person he knows is a peace officer or a person acting in a peace officer's presence and at his direction from effecting an arrest, search, or transportation of the actor or another by using force against the peace officer or another. TEXAS PENAL CODE ANN. § 38.03 (West Supp. 1995).

showing of force, submission of an excessive force claim to the jury should be barred, especially where, as here, the plaintiff's injuries resulted from the mutual struggle and there is no evidence of gratuitous violence on the part of Officer Saenz.[4]

This Court has recently concluded that a section 1983 claimant, who has been convicted for resisting arrest, has no viable cause of action against a police officer for an alleged constitutional deprivation related to the use of excessive force during an arrest. *Heck v. Humphrey*, ____ U.S. ____, 114 S. Ct. 2364, 2372 n. 6, 129 L. Ed. 2d 383 (1994). *Heck* instructs that in order to recover damages for harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus. *Id.* at 2372.

In *Heck*, this Court noted that § 1983 "creates a species of tort liability," and thus turned to the common law of torts to determine whether there existed any bar to Heck's lawsuit. *Id.* at 2370-71. For example, the instant case presents a close analogy to the common law tort of battery. But here, we have a police officer who is the actor and the arrestee who responded to his arrest with physical force. In modern times, a trend has developed toward requiring the arrestee to submit to a known peace officer, even in the face of an unlawful arrest, in the interest of keeping the peace. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 27, at 156 (5th ed. 1984) (and sources

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[4] Keeping in mind that Officer Bennett's conduct (allegedly kicking Gonzalez) is not at issue due to his exoneration.

cited therein). Gonzalez knew that Saenz was a police officer and that he was being placed under arrest. He also knew that if he resisted the arrest he would be forcefully handcuffed. "Police officers ... act under the promise of force if there is not strict obedience to their orders." *Kilcup v. McManus*, 394 P.2d 375 (Wash. 1964). Moreover, because Saenz was acting in the public interest, his discretion in effecting the arrest is greater than that allowed by general tort principles under the doctrine of "self-defense." *See* RESTATEMENT (SECOND) OF TORTS § 132, cmt. a (1965).

Indeed as the jury found, Gonzalez, a former boxer, voluntarily and purposely resisted. Such resistance, in conjunction with his verbal conduct in the police car en route to the station (reasserting his challenge to Saenz to fight him), indicates that he *mutually assented* to the confrontation. Some jurisdictions, including Texas, view mutual assent as a defense which *bars* a claim for battery by either participant. *Dixon v. Samartino*, 163 S.W.2d 739 (Tex. Civ. App.--Galveston 1942, writ ref'd w.o.m.). *See O'Connor v. Western Freight Ass'n*, 202 F. Supp. 561 (S.D.N.Y. 1962).

In sum, Gonzalez's physical resistance, together with the *in kind* response of Officer Saenz, should have barred his excessive force claim. *Heck*, *supra*.

3. *Alternatively, the minimum threshold required to establish constitutionally "excessive" force presents an issue of importance in light of existing jurisprudence.*

a. Officer Saenz's force was graduated to the plaintiff's resistance and did not exceed the required amount to effect the arrest.

When faced with physical resistance, an officer's use of force which only subdues and controls the arrestee cannot be "excessive to the need."

In relationship with other excessive force decisions, the instant case can be contrasted with *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), in which this Court concluded that the exercise of deadly force is almost always unreasonable in circumstances such as these. The *Garner* Court held that the use of deadly force to prevent the escape of a suspected felon is always constitutionally unreasonable unless probable cause exists to believe that a suspect poses a significant threat of death or serious physical injury to the officer or others. *Garner*, 105 S. Ct. at 1697.

In October 1974, two Memphis police officers were dispatched to answer a prowler call at a residence. Arriving at the scene, Officer Hymon investigated the premises outside the house, heard a door slam and observed a person run across the back yard, stopping at a six-feet high fence. Officer Hymon saw no sign of a weapon and ordered the suspect to halt. *Id.* at 1697. The suspect began climbing the fence. Concluding the man would escape if allowed to jump the fence, Hymon fired his weapon fatally wounding the individual. Balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interest against the

importance of the governmental interest alleged to justify the intrusion," this Court stated that the use of deadly force to prevent the escape of such a suspect, whatever the circumstances, is "constitutionally unreasonable." *Id.* at 1701.

As in *Garner*, the issue here is whether the use of force applied by Officer Saenz under the circumstances of this case violated Gonzalez's constitutional rights. *See id.* at 1708 (O'Connor, J., dissenting). However, *Garner* occupies a position on the spectrum of excessive force jurisprudence opposite this case. Both cases present suspects who are unarmed and pose no real threat of death or serious injury to the officer or third persons. Both suspects resisted arrest: Garner by fleeing, Gonzalez by physically resisting. In both cases, a seizure occurred. The difference here is the nature of the governmental intrusion. Officer Hymon used deadly force, a maximum intrusion. Contrastly, the facts of the instant case demonstrate only a minimal intrusion on the part of Officer Saenz.

Undoubtedly, the determination of whether an officer's conduct constitutes constitutionally excessive force requires "careful attention to the facts and circumstances of each particular case, including [but not limited to] the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 109 S. Ct. at 1873. The analysis necessarily involves an examination of the nature of the force actually applied by the officer.

Officer Saenz's conduct, assuming the truth of Gonzalez's testimony, does not rise above the maximum amount of force necessary to effectuate the arrest as a matter of law. Saenz's conduct exemplified a "weaponless attempt

to contain and control rather than to abuse or dominate." *Franklin v. City of Boise*, 806 F. Supp. 879, 886 (D. Idaho 1992).

b. Alternatively, Saenz's use of force did not implicate constitutional interests.

Alternatively, however, there currently exists a gray area as to the minimal threshold of force necessary to implicate the constitution. Can an officer's use of force to effect a lawful arrest be minimally "excessive" yet not rise to the level of a constitutional deprivation? *Johnson v. Morel*, 876 F.2d 477, 480 (5th Cir. 1989), seems to answer that question affirmatively. In *Johnson*, the Fifth Circuit interpreted *Graham* and articulated the following standard applicable to excessive force claims:

> A [§ 1983] plaintiff can thus prevail on a Constitutional excessive force claim only by proving each of these three elements:
>
> (1) a significant injury, which
>
> (2) resulted directly and only from the use of force that was ***clearly excessive*** to the need; and the excessiveness of which was
>
> (3) objectively unreasonable.
>
> If any one of these elements fails, so too does the plaintiff's claim. We overrule all previous decisions of this circuit to the contrary.

Johnson, 876 F.2d at 480 (emphasis added and footnotes omitted). *See also* RESTATEMENT (SECOND) OF TORTS § 132, cmt. a (1965) ("Indeed, if the actor is making or attempting to make an arrest for a criminal offense he is acting for the protection of the public interest ... and is not liable unless the means which he uses are *clearly excessive*") (emphasis added); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 19, at 126 (5th ed. 1984) ("Sometimes, it is simply held that the privilege is one to use reasonable means, *and this would justify such means as a reasonable person would use even though it might involve more force than reasonably appears to be necessary*") (emphasis added).

Simply put, accepting all of Gonzalez's allegations against Officer Saenz as true, Officer Saenz's use of force was not "*clearly excessive* to the need" to apply force in order to subdue Gonzalez. The Fifth Circuit's affirmance of the trial court's judgment in the instant cause is contrary to the Fifth Circuit's own precedent.

c. Moreover, in light of Bennett's exoneration, Officer Saenz's conduct could have only been *de minimus*.

At trial, Gonzalez claimed that Officer Saenz "hit [him] with his knee," and that Saenz "put his knee on [Gonzalez's] head." Gonzalez did not accuse Officer Saenz or Officer Bennett of employing any type of weapon in conducting the arrest. Both Gonzalez and Mr. Kowalsky, *see* Factual History, *supra*, agreed that the struggle ended the moment Gonzalez was successfully cuffed. No further physical confrontations occurred between Officer Saenz and Gonzalez despite Gonzalez's continued provocation.

However, Officer Bennett was the one accused of the most egregious conduct. Gonzalez accused Officer Bennett of kicking him in the back while he was on the ground. However, the jury exonerated Officer Bennett, a finding unchallenged on appeal. Bennett's exoneration only supports the conclusion that the use of force exhibited by Officer Saenz does not, and should not, violate Fourth Amendment standards. Again, keep in mind that Officer Saenz was not present at trial.

C. The Fifth Circuit's Affirmance In This Case Effectively Leaves In Place A Judgment Which Conflicts With Other Cases Of Similar Facts.

As mentioned above, the Fifth Circuit's decision in this case conflicts with its prior opinion in *Johnson v. Morel*.

Further, the Fifth Circuit also analyzed a § 1983 excessive force claim under facts very similar to those presented here in *Gassner v. Garland*, 864 F.2d 394 (5th Cir. 1989) and concluded that the officer's use of force was objectively reasonable. *Id.* at 400. In February 1985, Gassner and his wife were driving his car, searching for their eight year old son whom they believed to be lost. Driving his vehicle in a frantic manner, Gassner was pulled over by Officer Bates. *Id.* at 395. Officer Bates was skeptical of Gassner's erratic behavior and began asking several questions. Frustrated, Gassner exclaimed, "I'm going back up to that shopping center. You can get into your damn squad car and follow me up there, and we'll talk there." *Id.* at 396. Bates grabbed him by the shoulder and a scuffle ensued, expiring only after Bates put Gassner in a choke hold, wrestled him to the ground, and handcuffed him. Bates then escorted Gassner to the back of his squad car where they drove to the shopping center. En route, Gassner

inquired as to the grounds for his arrest to which Bates answered, "speeding." Gassner replied, "You dumb f___. That's the only thing you can't arrest me for." *Id.*

Holding that Bates was entitled to summary judgment on the issue of excessive force, the Fifth Circuit stated:

> Gassner himself indicates that he resisted Bates's attempt to spread eagle him against the car, and that this resistance continued until Bates put him in a choke hold, wrestled him to the ground, and handcuffed him. Given Gassner's resistance to the arrest, the force used by Bates in this case was reasonable, and will not support a claim of excessive force.[5]

Id. at 400.

Additionally, the result in this case conflicts with *Young v. Killeen*, 775 F.2d 1349, 1352-53 (5th Cir. 1985), which justifies a greater exercise of force and that actually used by Officer Saenz. The *Young* court held that a police officer did not act with excessive force when fatally shooting a suspect who "made a movement as if to duck back into [his] car to retrieve something." *Id.* at 1352. Under *Young*, to the extent Officer Saenz may have been negligent in failing to ask Gonzalez to dismount from his bicycle before attempting to cuff him, the only proposition arguably supported by the evidence, such negligence fails to invoke

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[5] Admittedly, the Court analyzed Gassner's claim for excessive force under *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. Unit A January, 1981), because the *Gassner* opinion predates *Graham*. Even so, Gonzalez failed to establish the requisite elements under the arguably less stringent test of *Johnson v. Morel*.

constitutional protection. *Id.* at 1353. *See Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986).

As *Gassner* and *Young* indicate, the situation where a police officer forcefully responds *in kind* to physical resistance of the arrestee does not impinge constitutional interests as a matter of law. Indeed, *Gassner* was decided on summary judgment.

Sensible precedent elsewhere supports this conclusion. For example, the Eighth Circuit in *Agee v. Hickman*, 490 F.2d 210 (8th Cir. 1974), *cert. denied*, 417 U.S. 972 (1974), analyzed a § 1983 excessive force claim where the arrestee offered physical resistance. The court of appeals affirmed a judgment that the force used by the officer defendants was reasonable and necessary to effect an arrest. *Id.* at 210. The plaintiff in *Agee* was a career criminal and inebriated on the day in question. While the officers were investigating the plaintiff's abandoned car on the side of a rural road, a twelve year old girl ran out of the woods screaming, with the plaintiff in pursuit. The girl informed the officer she had been raped. They handcuffed the plaintiff's hands behind his back and he was placed under arrest. So it would be easier for the suspect to ride in the back of the patrol car, one of the officers removed the cuffs with the intent of replacing them with the arrestee's hands in front of his body. *Id.* at 211. With his cuffs unlocked, the plaintiff backed away from the officers, squared off, clinched his fists and stated, "you are making a big mistake because I am in pretty good shape." *Id.* at 211-12.

At that moment one of the officers punched the plaintiff in the stomach and slapped him a few times on the face. The officer then leaned the plaintiff over the car and again cuffed his hands behind him. Like the instant case, the

officer in *Agee* admitted he was angry and did not contend that the plaintiff actually struck or kicked him. *Id.* at 212. Because force can only be used to overcome physical resistance or threatened force, the court was satisfied that the plaintiff "failed to demonstrate that [the court's] determination that the force used was reasonable and necessary under the circumstances to effect plaintiff's arrest and keeping him in custody was clearly erroneous."

Also particularly instructive is the decision in *Bailey v. City of New Orleans*, 533 F. Supp. 193 (E.D. La. 1992). Kim Bailey was riding a motorbike on top of a levee next to the Mississippi river. Officer Curet observed Bailey's conduct and stopped her. Pursuant to Louisiana law, riding a motorbike on the levee was illegal. *Id.* at 194. Curet approached Bailey and asked her for her operator's permit. Bailey responded that she did not have her license with her, and Curet placed her under arrest. *Id.* at 195.

A number of verbal and physical exchanges then occurred. She resisted Curet's grasp on her arm by struggling. While holding Bailey's arm behind her back, Curet moved her over to his police car where he pushed over and against the hood in order to restrain her while placing her in handcuffs. Bailey continued her attempts to free herself from Curet's grip. Frustrated, Curet turned Bailey back around to face the squad car by using his hand on her arm and by using his other hand to hold her by the hair at the back of her head. *Id.* During the struggle, Curet caused the left front area of Bailey's head to hit the car's hood. *Id.*

Bailey sought damages against Curet under § 1983 for excessive force. After a bench trial, the court concluded that Curet's physical force was responsive in kind to the continued resistance of Bailey:

> From the moment Officer Curet attempted to place Bailey under arrest, the verbal and physical changes exchanges between them escalated. Curet met plaintiff's refusal to be arrested by grasping her arm to remove her from the bike. Curet then met plaintiff's attempts to free herself from his grip by holding her arm behind her back, and by using his police car as a support against which he could handcuff her. When plaintiff further struggled by turning toward Curet, he met her resistance by turning her around and forcing her against the hood of the police car. *Every act of resistance by plaintiff required Curet to exert greater force to retain control of the situation. . . . Curet's actions were commensurate with plaintiff's increased resistance and therefore reasonable in light of the existing need.*

Id. at 196 (emphasis added).

Bailey demonstrates a fact pattern nearly identical to the one before this Court. *Bailey* does not stand for the proposition that *any* amount of force exercised by a police officer is justified so long as the suspect resists. Rather, the instant record is legally insufficient to support an excessive force finding under current constitutional standards and no reasonable and impartial jury could conclude otherwise.

As the *Bailey* court explains, a police officer faced with a resisting arrestee is required to exert a greater amount of force to retain control of the situation. Such a display of force is not, and should not be, "clearly excessive" to the need. Because this decision conflicts with several other

published opinions of the Fifth Circuit and other courts of appeals, certiorari is justified under Rule 10.

CONCLUSION AND PRAYER

For all these reasons, Saenz respectfully prays that this Court grant writ of certiorari.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60507

RICHARD ARRELLANO GONZALES,

Plaintiff-Appellee,
Cross-Appellant,

and

MARIA GONZALEZ,

Plaintiff,

versus

CITY OF BROWNSVILLE, ANDRES VEGA and DANIEL BENNETT,

Defendants,

and

JAVIER SAENZ,

Defendant-Appellant,
Cross-Appellee.

Appeal from the United States District Court for the
Southern District of Texas
(87 CV 190)

Before JOLLY, DAVIS, and EMILIO M. GARZA, Circuit Judges. PER CURIAM:*

The judgment of the district court is AFFIRMED. See Local Rule 47.6.

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DISTRICT

RICHARD ARRELLANO GONZALES Plaintiff, vs. JAVIER SAENZ and DANIEL BENNETT, individually and in their official capacity as Police Officers of the City of Brownsville, Defendants.	))Civil Action)Number B-87-190))))))

MEMORANDUM

The above case was tried before this Court and a jury on February 7 and 8, 1994. The plaintiff in this case was suing two Brownsville Police Officers, Javier Saenz and Daniel Bennett, for using excessive force in his arrest. After the jury was charged, they deliberated and rendered a verdict against the defendant, Javier Saenz, but exonerated Officer Daniel Bennett. The total amount of damages awarded by the jury to the plaintiff, Richard Arrellano Gonzalez, was $150,000 in actual damages and $10,000 in punitive damages for a total of $160,000.

Motions have been filed after the rendering of the verdict by the jury as follows:

A motion by the defendant, Javier Saenz, for judgment as a matter of law, for a new trial or remittitur.

The motion of the defendant, Javier Saenz, for judgment in his behalf as a matter of law and a new trial are hereby DENIED.

His motion for a remittitur is hereby GRANTED and judgment of the jury is reduced to $65,000 actual damages

and $10,000 punitive damages for a total of $75,000.

The ~~defendants~~ have filed a motion for prejudgment interest which is hereby DENIED because of the long time it took for this case to come to trial. Post-judgment interest, however, will be granted at the rate of 4.51% from entry of judgment.

The ~~defendants~~ have also filed a motion for attorneys fees and costs. After looking at the affidavits for the attorneys fees being charged, I find that some of the hours have been doubled by two attorneys when only one was needed and I am reducing the attorneys fee award to Elia Cornejo-Lopez and Richard Zayas to a joint amount of $24,000.

The motion for costs is also being reduced to the sum of $1,711.75, which will be charged as court costs. This includes the filing fee of $120, the $500 fee paid to Dr. Aguilar Vela as a treating physician and expert witness, the translator's fee of $250 and depositions taken in this case. All other costs are DENIED.

Also pending is a motion by the plaintiffs for post-judgment interrogatories and post-judgment depositions of Andres Vega, Jr., City Manager; Victor Rodriguez, Chief of Police; Javier Saenz, and Ben Reyna, Head of Internal Affairs. The plaintiffs in their motion do not state what information they are seeking or why their testimony is needed and the motion is therefore being DENIED.

Therefore, a judgment is being entered in this case for $75,000 in behalf of Richard Arrellano Gonzalez and against Javier Saenz, for court costs of $1,711.75 and attorneys fees of $24,000.

If plaintiff does not accept the remittitur, a new trial is hereby ordered and the plaintiff will advise the court within ten (10) days whether or not the remittitur is accepted.

ENTERED this 19th day of April, 1994.

/s/
Reynaldo G. Gara
Circuit Judge of the
Fifth Circuit Court of Appeals
Sitting by Designation

APPENDIX C

JURY VERDICT

QUESTION NO. 1:

Do you find from a preponderance of the evidence that Officer Javier Saenz used excessive force, as that term has been defined to you, in making the arrest of Richard Gonzalez?

ANSWER "YES" or "NO"

ANSWER: YES

QUESTION NO. 2:

Do you find from a preponderance of the evidence that Officer Daniel Bennett used excessive force, as that term has been defined to you, in making the arrest of Richard Gonzalez.

ANSWER "YES" or "NO"

ANSWER: NO

If you have answered questions Nos. 1 and 2 "NO", then you need not answer any further questions. However, if you answered "YES" to either question No. 1 or No. 2, then continue.

QUESTION NO. 3:

Do you find from a preponderance of the evidence that Richard Gonzalez was resisting his arrest?

ANSWER "YES" OR "NO"

ANSWER: YES

QUESTION NO. 4:

Do you find from a preponderance of the evidence that Officer Bennett reasonably believed that his actions were in accordance with clearly established law in existence at the time of the occurrence of the arrest of the Plaintiff Richard Gonzalez.

ANSWER "YES" or "NO"

ANSWER: YES

QUESTION NO. 5

Do you find from a preponderance of the evidence that Officer Saenz reasonably believed that his actions were in accordance with clearly established law in existence at the time of the occurrence of the arrest of the Plaintiff Richard Gonzalez.

ANSWER "YES" or "NO"

ANSWER: NO

QUESTION NO. 6

What amount of money, if any, if now paid in cash, will compensate Richard Gonzalez for the damages that he has suffered?

ANSWER in DOLLARS and CENTS

WE THE JURY ANSWER 150,000.00

In answering, keep in mind the elements I have set out that you may compensate Richard Gonzalez for.

QUESTION NO. 7

If your answers to questions Nos. 4 and 5 are no, then you may award exemplary damages to Ricardo Gonzalez.

If you find that Ricardo Gonzalez is entitled to exemplary damages:

What amount of money, if any, if paid now in cash is he entitled to from Officer Saenz?

WE THE JURY FIND $10,000.00

What amount of money, if any, if paid now in cash is he entitled to from Officer Bennett?

WE THE JURY FIND $ -0-

DATE: 2-8-94 FOREPERSON: /s/

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

RICHARD ARRELLANO GONZALEZ Plaintiff	)CIVIL ACTION)NUMBER B-87-)190
vs.	)
JAVIER SAENZ and DANIEL BENNETT individually and in their official capacity as Police Officers, of the City of Brownsville Defendants.	)

JUDGMENT

The above case came on for trial before the undersigned and a jury previously duly selected, on February 7 and 8, 1994. The jury answered interrogatories posed to them by the Court and according to their answers they exonerated Daniel Bennett but found against Officer Javier Saenz for using excessive force in the arrest of Richard Arellano Gonzalez and rendered judgment in his behalf for for $150,000 for actual damages and $10,000 punitive damages.

The defendant Javier Saenz filed a motion for remittitur which was granted and is now Adjudged and Decreed that Richard Arrellano Gonzalez recover from Javier Saenz the sum of $75,000.

It is Ordered, Adjudged and Decreed that court costs in the amount of $1,711.75 be taxed to the defendant Javier Saenz in this case and that attorneys fees of $24,000 also be granted to the attorneys for Plaintiff and against Javier Saenz.

The plaintiff will receive interest on this judgment at the rate of 4.51% from date of entry.

ENTERED in Brownsville, Texas, this 19th day of April, 1994.

/s/
Reynaldo G. Garza
Circuit Judge of the
Fifth Circuit Court of Appeals
Sitting by Designation